In the Supreme Court
OF THE
United States

October Term, 1973

No. 73-5993

John E. Test, *Petitioner*,

vs.

United States of America, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF
and
BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in this case to consent to filing the attached brief *amicus curiae* out of time. Petitioner as well as respondent have granted their consent to MALDEF's filing the attached brief out of time.[1]

MALDEF was established on May 1, 1968, as a non-profit corporation incorporated under the laws of

[1]The letters of consent have been filed with the Clerk.

the State of Texas, primarily to provide legal assistance to Mexican Americans (Chicanos).[2] In its efforts to assist the Mexican American community achieve its rights under the law, MALDEF has been involved in litigation which has challenged the tradtional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunities; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct.

Courts have long recognized that Chicanos constitute a separate, identifiable ethnic group which historically has been subjected to pervasive patterns of illegal discrimination in our society. E.g., *Hernandez v. Texas,* 347 U.S. 475 (1954). One federal district court recently assessed the obstacles confronting the Mexican Americans in Texas who are represented by MALDEF.

> Because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican American . . . has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

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[2]Currently the word Chicano is used interchangeably with the term Mexican American. The term Spanish-surnamed is generally more comprehensive.

Graves v. Barnes, 343 F.Supp. 704 (W.D. Texas, 1972), *rev'd in part, aff'd in part, sub nom. White v. Register*, 412 U.S. 755 (1973). See also *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Montoya v. People*, 141 Colo. 9, 345 P.2d 1062 (1959).

The questions presented in the instant case go to the heart of the fair administration of the criminal justice system in the federal courts. These questions most immediately concern the criminal defendant's statutory and constitutional rights of access to jury records which must, of necessity, provide the basis for any successful jury challenge. More fundamentally, the Court is called upon to give point to the basic rights guaranteed by the Constitution of the United States and the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §1861 *et seq.* [hereinafter referred to as "Act"]: the defendant's right to grand and petit juries selected at random from a fair cross-section of the community; and the right of all qualified persons to be afforded the opportunity to be considered for jury service. The defendant who is presently before the Court, and thousands of others, unlawfully continue to be denied both the benefit of these rights and the judicial means by which to vindicate them.

The Mexican American community is one of the groups hardest hit by the continuing inequities of the grand jury system, both Federal and State. The United States Commission of Civil Rights has found, for example, significant and widespread underrepre-

sentation of Mexican Americans on grand and petit juries throughout the Southwest.[3] The Commission determined that factors such as low income status and English language deficiencies did not explain the wide disparity between the proportion of Mexican Americans in the total population and their proportional representation on juries. Rather, the disparities were charged directly to the officials empowered to select juries. These officers were found to have abused their overbroad discretion both by actively excluding Mexican Americans from the jury lists and by failing to take affirmative steps to obtain a truly representative cross-section of the community for jury service.[4]

Substantial underrepresentation of Spanish surnamed citizens equally characterizes the federal jury system, despite the advances made in the statutory framework.[5] Indeed, the district judge in the instant case openly conceded that Blacks and Spanish-surnamed persons were underrepresented on the very jury lists he refused to open to scrutiny. (R 17.)

The continuing enormity of the problem recently was articulated by one Federal district court judge, *United States v. Burkett*, 342 F.Supp. 1264 (D. Mass. 1972), whose judicial district typically utilized only

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[3]United States Commission on Civil Rights, *Report on Mexican Americans and the Administration of Justice in the Southwest, A Study of Grand Jury Service by Persons of Spanish Surname and by Indians in Selected California Counties* (1970). [Hereinafter cited as "US Commission on Civil Rights Report."] See also, *Oregon v. Mitchell*, 400 US 112, 132 (1970).

[4]U.S. Commission on Civil Rights Report, *supra*, et p. 46, 88.

[5]Compare, The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* with its predecessor, 71 Stat. 638, Sept. 9, 1957.

voter registration lists in formulating its entire juror pool.[6]

> A jury selection system which is fundamentally based upon voters' registration lists in a state in which no one is required to register for voting, and in which it is obvious to anyone who scans the voters' registration lists that the black, those of Oriental origin, those with Spanish surnames, women, young persons, and poor and deprived persons generally tend not to register to vote, in proportions related to their number in the citizenry, . . . is a jury system which raised constitutional problems of serious import.
>
> * * *
>
> Any person familiar in the slightest degree with the grand and petit juries in this district is aware that the use of the Massachusetts voting lists . . . and the policy of excusing affluent and educated persons from jury duty have produced juries predominantly white, lower-middle class, and middle-aged . . . The effect of that apparently purposeful emphasis in prejudicing young defendants, victims of denials of civil rights, persons from non-white races, and others needs no elaboration. Here participatory democracy is a sham.
>
> * * *
>
> What is in challenge is the whole system of justice in America.

342 F.Supp. at 1264-66.

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[6]Since the passage of the 1968 Act, almost all federal judicial districts use voter registration lists or actual voter lists as their sole source of potential jurors. See, Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis and a Case Study*, 10 Amer. Crim. Law Rev. 771, 797 (1972). See also, *United States v. Butera*, 420 F. 2d 564 (1st Cir., 1970).

The nationwide expression of this underrepresentation of Spanish-surnamed citizens is manifest in the statistics recently compiled by the Bureau of Census with regard to the 1972 national election.[7] The Bureau found that less than half of all Spanish surnamed citizens of voting age reported themselves to be registered voters, while little more than a third were reportedly actual voters.[8] The failure of Mexican Americans to play an active role in the electoral process has been historically documented as the result of legislative obstacles. Among the most severe of the inhibitions to voting was the requirement of literacy tests, now unconstitutional. Other obstacles to voting included the poll tax and cumulative poll tax which was overruled in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); residency requirements ruled illegal in *Dunn v. Blumstein,* 405 U.S. 330 (1972); and the requirement of annual registration overruled in *Beare v. Smith,* 321 F.Supp. 1100 (W.D. Tex., 1971), *aff'd,* ..... F.2d ..... (5th Cir. No. 71-1924; July 31, 1974). Although many of these obstacles to voting no longer confront Mexican Americans, the situation has not appreciably improved. A study conducted by the League of Women Voters Education Fund recognized that among the contributions to disenfranchisement of minorities were the proce-

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[7]Census counts themselves have been found to substantially undercount Mexican Americans and other minorities. *Confederacion de la Raza Unida v. Brown,* 345 F.Supp. 909 (N.D. Cal. 1972).

[8]U.S. Bureau of Census, *Current Population Reports,* Series P-20, No. 253, "Voting and Registration in the Election of November 1972", pp. 17-18, 22-23. See also, Kairys, David, *Jury Selection: A Mathematical Method,* 10 Amer. Crim. Law Review 771.

dures employed by voting administrators. According to this study, election officials have never been required to take affirmative steps to encourage people to vote. Furthermore, they have never been required to adopt practices to increase voting convenience. The study noted that 38% of all polling places observed were not clearly marked, 58% of the surveyed polling places lacked convenient public transportation, and 89% of the local voter officials in the communities observed did not publish a voter information guide.[9]

Whatever its cause, this underrepresentation of Mexican Americans on voter lists, and hence on juror lists which are based solely upon voter lists, has serious and legally intolerable consequences. First, the absence of minority grand jurors heightens the risk that prejudice will affect grand jury actions. This, of course, is the fundamental reason for the constitutional and statutory protections to assume fair selection.[10] Secondly, as noted by one legal commentator:

> Selection as a grand or petit juror presents the sole opportunity for the average citizen to actively participate in the administration of government. Jury service is a fundamental prerogative of citizenship. The opportunity to participate in government through service as a grand or petit juror has been found to be one of pro-

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[9]Williams, *Voting Barriers: Strategies for Removing Obstacles to the Black Ballot,* 2 Black Law Journal 164, 165 (1972).

[10]See, Comment, *Voter Registration Lists: Do They Yield A Jury Representative of the Community?* 5 U. of Mich. J. of Law Reform 385 (1972). [Hereinafter referred to as Michigan *Comment.*]

> found psychological importance to minority persons. Studies have shown that minority groups are more likely to feel they belong to the community and society if they are available or called as jurors. Such involvement has a profound impact on their attitude toward law and the system of justice in this country. However, since minorities are continuously excluded or greatly underrepresented, their confidence and trust in government deteriorates, while, as "legal outcasts", their sense of inferiority and alienation grows.[11]

In fact, a desire to eliminate this growing isolation of minority groups from the process of government underlay in large part the action of Congress in enacting the Jury Selections and Service Act of 1968. As noted by former Attorney General Ramsey Clark in 1967:

> While the present system appears not to have operated unconstitutionally, in some districts Negro representation on juries has been substantially less than the proportion of Negroes in the

[11] Edward A. Villalobos, *Grand Jury Discrimination And The Mexican American*, 5 Loyola of Los Angeles L.R. 87, 121 (1972); See, Broeder, *The Negro in Court*, 1965 Duke L.J. 19, 26; United States Commission on Civil Rights Report at 113, 114. See also, Michigan *Comment* at p. 389; Statement of Lawrence Speiser, Director of National Capital Area American Civil Liberties Union, Federal Jury Selection, Hearings Before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, 90th Congress, 1st Session, p. 334, wherein he states with reference to the sole use of voter registration lists that this practice "Narrow[s] the base of jury selection and in so doing cast[s] aside the persuasive evidence that jury service is a powerful means of education in the democratic process, even for those previously apathetic about their civil responsibilities; Gwein, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit*, 20 Mercer L.R. 349 (1969).

> community and other classes have sometimes been inadequately represented on juries. Where such disparities occur they create an impression of unfairness in the judicial system of the United States—an impression which should be scrupulously avoided if we are to foster respect for the rule of law.

113 Cong. Rec. 3954, 3955. (Letter of Attorney General Clark (1967). See also, *Peters v. Kiff*, 402 U.S. 493, 502-03 (1972).

Exclusion of Mexican Americans from grand juries adversely affects the Mexican American community's ability to call government agencies and officials to account for their actions or inactions. For example, "A Study of Grand Jury Service By Persons of Spanish Surname and By Indians in Selected California Counties," conducted by the California Rural Legal Assistance Foundation found that:

> [In] California, grand juries have the authority both to indict persons for crimes and to investigate and evaluate the administration of local government. Because of this broad authority, exclusion of Mexican Americans from grand juries not only may affect their ability to receive fair and impartial criminal justice but is also likely to render grand juries less vigorous in inquiring into and exposing governmental deficiencies . . . adversely affecting Mexican Americans.[12]

The virtually universal exclusion of Chicanos from participation in the federal judicial system except as

[12]U.S. Commission on Civil Rights Report, at 39.

parties-defendant, is particularly damaging in view of the long history of discriminatory law enforcement which has plagued Chicanos throughout the Southwest.[13] This pervasive pattern of discrimination and harassment is facilitated and compounded by subsequent exclusion of Chicanos at the indictment and trial stages of Federal prosecutions.

MALDEF has litigated numerous suits attacking discriminatory and illegal practices of municipal, state, and federal government officials which affect the lives and liberties of Mexican Americans and other minorities. With few exceptions, these challenges have been based upon the irreconcilability of such practices with the purpose and spirit of the Constitution, and upon the affirmative remedies afforded by Congress under the Civil Rights Acts and other statutes. Since the decision of the Court in this case may affect the scope of the Federal Jury Service and Selection Act of 1968, 28 U.S.C. §1861 *et seq.*, MALDEF deems it important to bring to the Court's

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[13]See, e.g., Committee on Labor and Public Welfare United States Senate, *The Migratory Farm Labor Problem in the United States*, 40-41 (1968); L. Grebler, J. W. Moore, and R. C. Guzman, *The Mexican American People: The Nation's Second Largest Minority* 532 (1970); A.B.C. Rendon, *Chicano Manifesto: The History and Aspiration of the Second Largest Minority in America*, 220 (Collier 1972); R. Acuna, *Occupied America: The Chicano's Struggle Toward Liberation* 41 (Canfield 1972); S. Steiner, *La Raza: The Mexican Americans* (Harper Colophon 1970). See also, *Hearings on Relations Between the Police and Mexican Americans Before the California Assembly Committee on the Administration of Justice* (1972); A. Morales, *Ando Sangrado . . . I Am Bleeding* (Perspectiva 1972); *Police-Community Relations in East Los Angeles, California: A Report of the California State Advisory Committee to the United States Commission on Civil Rights* (1970).

attention some implications of the significant issues here presented by respectfully praying leave to file a brief *amicus curiae*, out of time, in support of petitioner's brief.

Dated: September 6, 1974.

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BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The interest of the Amicus Curiae is set forth in the foregoing motion.

ARGUMENT

Amicus Curiae respectfully urges that the decision below be reversed. The clear provisions of the Act and the relevant case law establish that petitioner was entitled to access to pertinent jury records if he made

an appropriate timely motion pursuant to 28 U.S.C. § 1867, accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of the Jury Selection and Service Act of 1968", [The Act] 28 U.S.C. § 1867 (a), (d), and (f). *United States v. DeAlba-Conrado,* 481 F. 2d 1266 (5th Cir. 1973); *United States v. Guzman,* 468 F. 2d 1245, 1246 (2nd Cir. 1972); *United States v. James,* 453 F. 2d 29 (9th Cir. 1971)[14]

The first question, then, becomes whether petitioner's showing of significant underrepresentation of Mexican Americans on the jury lists, if true, constitutes a violation of his rights under the Act. *Amicus* agrees with both the Solicitor General[15] and petitioner[16] herein that the Act clearly imposes an affirmative obligation upon jury selection officials to obtain a jury pool drawn from a fair cross-section of the community, by whatever means necessary; and that petitioner's allegations of underrepresentation establish, on their face, a clear violation of that duty, and

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[14]Several courts, including the Tenth Circuit, either: (1) have found that the filing of the sworn statement is not necessary to trigger the provisions of § 1867(f), but rather that access to the documents must be permitted as of right, for the *preparation,* as well as the presentation of a motion under § 1867(a). *United States v. Beaty,* 465 F. 2d 1376, 1381-82 (9th Cir. 1972); *United States v. Tijerina,* 446 F. 2d 678, 680 n. 5 (10th Cir. 1971); or (2) have waived the requirement for the statement under certain circumstances. *United States v. Ware,* 473 F. 2d 530 (9th Cir., 1973). See also, *Mobley v. United States,* 379 F. 2d 768, 773 (5th Cir., 1967) (pre-Act discovery of jury questionnaires improperly denied by trial judge). In the case at bar the requirement for the filing of a sworn statement, if any, was met.

[15]Memorandum of the United States, pp. 9-10.

[16]Brief for the petitioner, pp. 33-38.

hence of the Act. Petitioner, therefore, was entitled to inspection of jury records essential to the proof of his claim. 28 U.S.C. § 1867 (a), (d), and (f).

Even assuming *arguendo* that the Act lacks a requirement of affirmative action, and that a violation of the Act must be proven by evidence of the so-called "systematic exclusion" of an identifiable group from the juror pool, petitioner's allegations establish a *prima facie* case of statutory violation. This showing of exclusion need not be accompanied by direct proof of discriminatory intent or bad faith on the part of jury selection or other officials. Rather, this intent may be inferred from a showing of persistent and substantial disparity between the proportion of the excluded group in the jury pool and the proportion of the group in the population. Under the Act, petitioner's allegations, if proven, shift the burden of proof to the government to justify the disparity.[17]

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[17]Some courts have taken the position that, despite the failure of Congress to so state, the Act *sub silentio* sanctions admitted failure to meet its cross-sectional goal where such failure is unattributable to intentional discrimination. Cf., *Parker v. United States*, 428 F. 2d 675 (10th Cir. 1971). According to this argument, even admitted and persistent underrepresentation of an identifiable group in juror pools drawn from voter lists does *not* constitute a violation of the Act, unless the discrepancy is shown to be the product of active discrimination by the state in the actual registration or voting process. The upshot of the argument is that, in alleging purportedly fortuitous underrepresentation of a group on the voting lists, a defendant has no right of access, under the Act, to jury records, or to a hearing on the allegations of underrepresentation. This reasoning, taken to its logical extreme, bars a challenge of this nature regardless of the degree of underrepresentation alleged. The argument is patently invalid on at least three levels. First, as shown, it runs counter to, and effectively vitiates the express provisions and intent of the Act. Secondly, it grafts onto the Act a requirement for elements of proof in excess of those required to prove a constitutional violation. Were the

Petitioner's allegations of underrepresentation further establish a *prima facie* case of a constitutional violation which alone is sufficient to require the granting of the petitioner's motions for access to records and for a hearing on his contentions. Lastly, even were petitioner's allegations insufficient under either the statute or the Constitution, this Court should exercise its supervisory power over the federal courts to facilitate the defendant's access to information which might well provide the basis for a cognizable jury challenge.

I. UNDER THE CONTROLLING STATUTE AND THE CONSTITUTION, PETITIONER WAS ENTITLED TO ACCESS TO JURY RECORDS UPON THE TIMELY FILING OF AN APPROPRIATE MOTION AND AFFIDAVIT PURSUANT TO 28 U.S.C. § 1867 (a), ALLEGING SUBSTANTIAL UNDERREPRESENTATION OF MEXICAN AMERICANS ON THE JURY LISTS.

A. Petitioner's Showing of Substantial Underrepresentation of Mexican Americans in the Jury Pool, If True, Establishes the Failure of Jury Selection Officials to Comply With Their Affirmative Statutory Duty to Formulate and Utilize a Jury Plan Productive of a Jury Pool Drawn From a Fair Cross Section of the Community.

As extensively documented in petitioner's brief, (Brief of Petitioner, p. 33), the legislative history of the Act clearly establishes that Congress imposed an affirmative duty upon jury selection officials to supplement the initial juror pool where necessary to

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Act to so require it would illegally diminish the rights it was intended to protect and implement. Third, the practical result is untenable, in that, under this formulation, substantially all federal jury selection plans would be immune from attack under the Act, no matter how egregious the underrepresentation of racial and other classes on the voter (and hence jury) lists.

achieve the cross sectional objectives of §§1861 and 1862 of the Act. Cf. 28 U.S.C. § 1863 (b) (2). Central to Congress' concerns in drafting the legislation was the need to inspire public confidence in the jury system.[18] As stated by Congressman Charles Mathias:

> Certainly, if people have some doubt that they can get absolutely impartial justice, and if they have any question about the administration of justice, then properly I think they would have a lack of confidence in the basic institutions of our government.
>
> * * *
>
> This bill removes the question of confidence in the judicial system. It insures that there will no longer be any juries composed of an elite, but that every man, *in fact*, will be judged by his peers, by his equals. This is the thrust and this is the essence of the bill.

144 Cong. Rec. 3993 (1968) (emphasis added).

There can be no doubt that Congress had the power to impose affirmative obligations upon federal jury selection officials in the exercise of its power to guarantee non-discrimination in grand and petit juries.[19]

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[18]The congressional concern in drafting legislation which would foster respect on the law is reflected in numerous provisions of the Act, among them: §1863(b)(4) which provides for flexibility in the number of names in the master jury wheel as well as periodic refilling of the wheel, and §1863(a) which provides a flexible plan for each district. See Brief of the Petitioner, pp. 32, 33.

[19]The defendant's right to a jury drawn from a fair cross-section of the community first was held to arise under the Fourteenth Amendment's equal protection guarantee in 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880); see *Smith v. Texas*, 311 U.S. 28 (1940). This right was extended to all federal litigants pursuant to the Court's exercise of its statutory power over the federal courts, *Glasser v. United States*, 315 U.S. 60 (1942);

Cf. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Oregon v. Mitchell,* 400 U.S. 112 (1970). As noted in the legislative history of the Act, Congress had before it extensive evidence of the substantial and chronic failure of pre-Act juror selection systems to produce a fair cross-section of the community. (See Brief of Petitioner, pp. 18-22, 24-27.) Confronted with overwhelming evidence indicating the need for comprehensive legislation to enforce the basic rights at stake, "The choice of appropriate remedies [was] for Congress and the range of available ones [was] wide." *Oregon v. Mitchell, supra,* 400 U.S. at 147, (Douglas, J. concurring).

In imposing the affirmative action requirement in the Act, the Congress was implementing a concept which long before had appeared in the decisions of this Court. The idea that jury selection officials have an affirmative obligation to draw from all identifiable groups in the community was first articulated by the Court in *Smith v. Texas,* 311 U.S. 128 (1940). In finding that the statistics in evidence established a constitutional violation, the Court stated:

> What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from

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Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and, finally, in 1972, to all state *and* federal litigants pursuant to the due process clauses of the Fifth and Fourteenth Amendments, *Peters v. Kiff*, 407 U.S. 493 (1972). This Court has also held the right to arise out of the Sixth Amendment right to jury trial. *Williams v. Florida,* 399 U.S. 78 (1970).

> whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

311 U.S. at 132. Accord: *Hill v. Texas,* 316 U.S. 400 (1942).

In the later case of *Cassell v. Texas,* 339 U.S. 282 (1950), the Court clearly restated and amplified the affirmative action requirement. The Court held that:

> Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.

339 U.S. at 289, quoting *Hill v. Texas, supra,* 316 U.S. at 404.

Thus, if a jury selection system is based upon a procedure which by intention or by fortuity operates to exclude large numbers of minority or other persons, jury officials have the affirmative obligation to "seek to learn" whether there are members of this excluded class who are qualified in fact for jury service. See, *Davis v. Davis,* 361 F. 2d 770 (5th Cir. 1966); *Mobley v. United States,* 379 F. 2d 768, 772 (5th Cir. 1967). This duty is binding on jury officials regardless of whether the initial source of the jury pool is selected under a "key man" or a voter list system.

Congress left no doubt in the provisions of the 1968 statute that the voter list system is not immune from this affirmative action requirement. To the contrary, § 1863 (b) (2) clearly states that:

> The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.

Thus in designating voter lists as the initial source for the federal juror pool, Congress did not intend that the cross-sectional goal be frustrated by either the intended or fortuitous failure of these lists to provide the requisite cross-sectional pool; nor did Congress permit such a result.[20] As noted by one of the most foremost experts in the area of federal procedure:

> Indeed the subsection 1863 (b) (2) provides that the plan *shall* provide a supplemental source of names in addition to voter lists when necessary to further the policy of the chapter, a provision included, undoubtedly, to avoid frustration of the fair cross-section policy in areas in which registration among certain racial or economic classes is below average.

5A J.Moore, *Federal Practice*, ¶ 47.05 n.2, p. 2022 (emphasis in original).

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[20]The Solicitor General has concurred in this interpretation, stating in his Memorandum that:

> . . . [W]hen Congress required that juries be selected from a "cross section of the community," it intended that federal jury selection plans be affirmatively formulated to achieve that goal and not merely to avoid discriminatory practices. While § 1863 provides for use of voter lists, it also contem-

Moreover, numerous appellate courts have held that the Act (and its predecessor) require that affirmative measures be taken by jury officials to assure the cross-sectional goal of both the statutes and the Constitution. Cf., *United States v. Fernandez,* 480 F. 2d 726, 733 (2nd Cir. 1973); *Mobley v. United States,* 379 F. 2d 768 (5th Cir. 1967); *Rabinowitz v. United States,* 366 F. 2d 34, 57 (5th Cir. 1966). In *Fernandez, supra,* for example, the court found that:

> The Jury Selection and Service Act [of 1968] goes beyond prohibition of "intentional" distortions and provides that in certain cases affirmative measures must be undertaken to insure that "juries" [are] selected at random from a fair cross-section of the community.

480 F.2d at 733 (citations omitted). The court noted in *Fernandez* that the defendant's evidence of statistical variance between the community and jury pool compositions was excluded erroneously by the lower court even though the variance was not alleged to have resulted from "systematic discrimination." 480 F.2d at 732.

Numerous courts interpreted the 1968 Act's predecessor legislation to include an affirmative action requirement, even though it lacked the specific supplementary language found in the present Act's §1863. See 71 Stat. 638 (Sept. 9, 1957). For example, in *Mobley v. United States, supra,* the court noted:

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plates resort to supplementary sources where necessary to foster the policies of Sections 1861 and 1862.
Memorandum for the United States, p. 9.

> There is, therefore, an affirmative duty imposed by the Constitution and the laws of the United States upon the jury selection officials . . . to know the availability of potentially qualified persons within significant elements of the community, including those which have been the object of state discrimination, *to develop and use a system that will result in a fair cross section of qualified persons in the community being placed on the jury rolls* and to follow a procedure which will not operate to discriminate in the selection of jurors on racial grounds.

379 F.2d at 772 (emphasis added). See also, *Rabinowitz v. United States, supra,* 366 F.2d 34, 57, 73. At least one court has refused in its consideration of jury challenges to acknowledge or rely upon what it finds to be the "technical distinction" between the so-called affirmative duty of jury officials to secure a fair cross-section and the allegedly lesser due not to discriminate. *United States v. Zirpolo,* 450 F.2d 424 (3rd Cir. 1971).

The courts further have noted that the Act's designation of voter lists as the initial source of jurors in no way diminishes the affirmative requirements of § 1863. As stated by one panel of the Fifth Circuit:

> The use of voter list [sic] is not the end sought. Rather, that is the principal source. If the source is deficient or infected its use alone will not suffice.

Broadway v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971). And Judge Wyzanski has flatly con-

demned the failure of federal courts to order supplementation of voter lists in the face of overwhelming evidence of their failure to reflect properly the community composition.

> It has been thought, at least in recent times, that a defendant, whether black or white, young or old, poor or rich, is entitled to a jury drawn from a pool which is an approximation of a cross section of the community, and from which no substantial group or class has been purposefully excluded.
>
> * * *
>
> The defendant has the right, it would therefore seem, not to have the pool diminished at the start by the actions or inactions of public officials, nor by the inertia, indifference, or inconvenience of any substantial group or class who do not choose to vote or to serve on juries. From the viewpoint of a black, or young, or poor, or rich defendant, his interest is in having a pool with a fair proportion of blacks, young, poor, and rich. To him it is a matter of indifference as to whether a diminished pool is due to action or inaction of third persons, whether public or private. In substance, the defendant is entitled to require that the public officials charged with jury selection, including judges who excuse jurors, proceed in such a way as to compel the calling of all eligible for jury duty who do not have socially valid excuses. In this connection jury duty is an obligation owed to the defendant, not a privilege which at the juror's pleasure the juror may choose to exercise or forego.

United States v. Burkett, 342 F. Supp. 1264, 1265 (D. Mass. 1972). See also *United States v. Zirpolo*, 450 F. 2d 424 (3rd Cir. 1971).[21]

The petitioner in the instant case made a timely motion under § 1867 (a) of the Act, accompanied by a sworn statement alleging substantial underrepresentation of Mexican Americans in the jury pool. The full extent of this underrepresentation could not be ascertained, of course, without disclosure of the requested jury records. Cf., *Mobley v. United States*, *supra*, 379 F.2d at 172. The alleged underrepresentation constitutes a clear violation of the affirmative requirements of the Act. Therefore, under the express terms and clear intent of the Act, as reflected in both its legislative history and its judicial enforcement, petitioner clearly was entitled to discovery of jury records pursuant to § 1867 (d) and (f) and to a hearing on his contentions.

B. Petitioner's Showing of Substantial Underrepresentation of Mexican Americans in the Jury Pool Establishes a Prima Facie Case of Systematic Exclusion of this Group in Violation of the Act and the Constitution.

Assuming *arguendo* that a violation of the Act must be predicated upon a showing of "systematic exclusion" of Mexican Americans from the jury pool, petitioner's allegations of underrepresentation nevertheless established a *prima facie* case of statutory and constitutional violation. The so-called "systematic exclusion" test originally evolved from this Court's con-

[21]For a discussion of the underrepresentation of Mexican Americans on the voting rolls, see Appendix "A" to this brief, infra, pp. i-iii.

sideration of state jury selection statutes which, although facially constitutional, had been unconstitutionally applied to exclude Blacks.[22] *See, e.g., Norris v. Alabama,* 294 U.S. 587 (1935) (total exclusion of Blacks); *Pierre v. Louisiana,* 306 U.S. 354 (1939); *Whitus v. Georgia,* 385 U.S. 545 (1967) (substantial exclusion of Blacks.)

The "systematic exclusion" rule originally was based upon the probable prejudice sustained by a minority defendant whose racial group was substantially excluded from the jury pool. Thus, no showing of actual prejudice was required of a defendant alleging substantial exclusion of his or her group from the jury pool.

In 1946, the Court extended to federal litigants the right to challenge the systematic exclusion of any identifiable group, pursuant to the Court's supervisory power to assure the fair administration of justice in the federal courts. *Thiel v. Southern P. Co.,* 328 U.S. 217 (1946). In 1972, the right to a fairly constituted cross-sectional jury pool was held to be a due process right of all citizens. *Peters v. Kiff,* 407 U.S. 493, 501 (1972). Hence, any litigant has standing to challenge the systematic exclusion of any identifiable group without a showing of actual prejudice.

A *prima facie* case of unconstitutional systematic exclusion has long been held to be established by a showing of persistent statistical disparity between the

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[22]The Court had already struck down exclusion of Blacks which was authorized by state statute. *Strauder v. West Virginia,* 100 U.S. 303 (1880).

proportion of an identifiable group in the total population of the community and the proportion that the group bears to the total eligible for jury service. *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Smith v. Texas*, 311 U.S. 128 (1940). Thus, in 1954, the Court held that Mexican Americans constituted a separately identifiable ethnic minority subject to the protection of the Fourteenth Amendment. *Hernandez v. Texas*, 347 U.S. 475 (1954). *See also, Keyes v. School District No. 1*, 413 U.S. 189 (1973). In examining evidence demonstrating that over a period of twenty-five years no Mexican American had served on any jury in a county with a sizable percentage of Mexican American residents, the Court in *Hernandez* found that a *prima facie* case of unlawful systematic exclusion of Mexican Americans had been established. *See* also, *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970).

Contrary to the apparent assertion of the Solicitor General in this case,[23] a showing of discriminatory intent on the part of government officials is not a necessary element of the constitutional violation. As early as 1942, the Court rejected the argument that good faith on the part of jury selection or other officials vitiated a claim of systematic exclusion in the federal courts:

> Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tend-

[23]Memorandum for the United States, pp. 8-10.

> encies may be of the best must not blind us to the dangers of allowing any encroachment whatever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

Glasser v. United States, 315 U.S. 60, 86 (1942).[24]

As more recently stated by the Ninth Circuit:

> When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial. . . . The lack of specific intent to discriminate . . . cannot offset the grossly discriminatory effect of . . . [the] jury selection process.

Carmical v. Craven, 457 P.2d 582, 587 (9th Cir. 1971).

In applying the systematic and purposeful exclusion test to jury challenges under both the 1968 and 1957 juror selection acts, appellate courts consistently have adopted this result-oriented approach. These cases stand for the proposition that a juror selection system which persistently produces substantial underrepresentation of an identifiable group is invalid under the Constitution and the juror selection statutes. For example, in the 1970 case of *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970), the court considered evidence purporting to show substantial underrepresentation of Mexican Americans on grand juries, 434 F.2d 697 (5th Cir. 1970). In finding the jury pool to be illegally constituted, the court held:

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[24]See *Rabinowitz v. United States*, 366 F. 2d 34 (5th Cir. 1966); *United States ex rel. Seal v. Wiman*, 304 F. 2d 53, 65 (5th Cir. 1962); *United States v. Butera*, 420 F. 2d 564, (1st Cir. 1970); *Davis v. Davis*, 361 F. 2d 770, 773 (5th Cir. 1966).

> The *results* of the jury selection process are what count, and the results in this case clearly show discrimination against Mexican Americans in the selection of grand jury members.

434 F.2d at 705 (emphasis in original).[25]

Other systematic exclusion cases arising under the 1957 statute dispel the notion that affirmative discrimination must be proven to be the cause of any underrepresentation which exists. *See, Rabinowitz, supra,* where the Fifth Circuit held, with regard to a "key man" system:

> If a fair cross section is consistently lacking then, without more, it is established that the [jury] commissioners have failed in their duty.

366 F.2d at 58.

Accord: *United States v. Fernandez*, 480 F2d 726 (2nd Cir. 1973); *Mobley v. United States*, 379 F2d 786 (5th Cir. 1967); *United States ex rel. Seals v. Wiman*, 304 F. 2d 53, 67 (5th Cir. 1962). See also, *United States v. Butera*, 420 F. 2d 564, 574 (1st Cir. 1970), where the court found that where the system at issue in that case (the "key man" system) persistently produced substantial and recognized underrep-

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[25]A California state court recently quashed indictments issued from a grand jury which it found to underrepresent Black, Latin Americans, blue collar workers and the young. The Court stated:

> The Court is of the opinion that the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong . . . . The pool was not shown to represent a cross-section of the community.

California v. Bingham, Civ. No. 4094, January 17, 1974. *See also, Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142, 150 (5th Cir. 1972); *United States v. Texas Education Agency*, 467 F.2d 848, 865 (5th Cir. 1972).

resentation of a sociologically distinct group, it was subject to attack even though valid on its face.

The principle underlying the pre-Act "key man" system cases clearly governs the application of the "systematic exclusion" test to post-Act cases. As noted earlier, the fact that under the Act voter lists are used to provide the initial juror pool cannot be held to diminish or in any way to affect constitutional and statutory rights to a jury drawn from a fair cross-section of the community. See, e.g., *Broadway v. Culpepper*, 439 F. 2d 1253, 1257 (5th Cir. 1971); *United States v. Barkett*, 342 F. Supp. 1264, 1265-66 (D.Mass. 1972). Under the "key man" cases, the constitutional and/or statutory violations were not defensible on the grounds that the jury officials did not intend their system to discriminate against the excluded classes. Cf. *Rabinowitz v. United States*, 366 F. 2d 34 (5th Cir. 1966). The same principle must hold true in cases challenging persistent and substantial underrepresentation under the voter list system. Petitioner's allegation of 50% underrepresentation of the Mexican American community on the jury lists undeniably establishes a *prima facie* case of systematic exclusion of this group in violation of the Act and the Constitution and triggers the provisions of § 1867 of the Act. Denial to the petitioner of access to those records and of a hearing on his motion effectively nullifies petitioner's basic constitutional and statutory rights.

Even if petitioner should be denied relief under the Act, his contentions nevertheless require that this Court remand the case for an evidentiary hearing,

allowing him access to the records necessary to substantiate his claim. *Mobley v. United States,* 379 F.2d 768 (5th Cir. 1967); *United States v. De Alba-Conrado,* 481 F.2d 1266 (5th Cir. 1973). In *De Alba-Conrado* the defendant failed to comply with the procedural requirements of the Act in making a jury challenge. Nevertheless, the court found that the challenge presented sufficient constitutional implications to require a remand with directions that all necessary proceedings, including discovery of jury records, be held to allow the complete and fair review of the defendant's contentions that the jury pool was illegally constituted. The court stated that:

> The necessity for the remand arises from the total lack of development in the court below of the pertinent facts necessary to a resolution of the crucial issue asserted here.

481 F.2d at 1270. This Court should find similarly that the constitutional dimensions of the issue asserted by petitioner herein require remand for discovery of relevant jury records and for a full evidentiary hearing.

II. EVEN IF PETITIONER'S STATUTORY OR CONSTITUTIONAL CLAIMS WERE TO FAIL THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PERMIT PETITIONER ACCESS TO JURY RECORDS AND AN OPPORTUNITY TO BE HEARD ON HIS CONTENTIONS OF UNDERREPRESENTATION

Even were the petitioner not entitled to jury documents or to a hearing on his contentions under either the Act or the Constitution, this Court would never-

theless have the power to grant petitioner relief under its supervisory power over the administration of justice in the federal courts. This power has long been invoked by the Court in its efforts to protect and implement the fundamental right to juries chosen from a fair cross-section of the community. *Thiel v. Southern P.Co.,* 328 U.S. 217 (1946). In the exercise of this power and duty to assure the fair administration of justice in the federal judiciary, this Court may impose fairness requirements over and above the constitutional requirements of equal protection and due process of law. *Fay v. New York,* 332 U.S. 261 (1947); *United States v. Butera,* 420 F. 2d 564, 568 (1st Cir. 1970).

Petitioner in the case at bar is confronted with a Catch-22 dilemma. He is told that he may not see the jury records because he has not made out a case, yet he cannot make out a case without access to the jury records. The problem is compounded by the petitioner's lack of financial resources,[26] which effectively prevents him from otherwise marshalling the comprehensive statistics necessary to prove up his claim. In view of the fundamental rights at stake, this Court must afford this petitioner, and others similarly situated, their only real opportunity to develop claims of substantial underrepresentation of identifiable groups. See, *Mobley v. United States,* 379 F2d 786 (5th Cir. 1967), where the appellate court found that the lower court erred in barring the defendant from

[26]Order of the Supreme Court of the United States granting motion for Leave to Proceed in *Forma Pauperis,* June 17, 1974.

access to juror questionnaires in aid of a challenge of systematic exclusion. The court noted:

> The ratio of white to Negro jurors on the . . . lists is not known for the record is silent on the subject. It is precisely this information that the appellant seeks to present to the court in order to support his contention that there was a systematic exclusion of persons of his race from these lists.

379 F. 2d at 772.

CONCLUSION

For the reasons stated above, amicus curiae respectfully submits that the district court's denial of the opportunity to inspect the jury wheels should be reversed and the case remanded for a full evidentiary hearing on the merits of petitioner's claims.

Dated: September 6, 1974.

Respectfully submitted,

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(Appendix A Follows)

Appendix A

UNDERREPRESENTATION OF MEXICAN AMERICANS ON VOTING ROLLS

Clearly, the exclusive use of voter registration lists as the source of prospective jurors fails to provide a representative cross section of the community:

> It becomes doubtful whether voter registration lists are capable of producing juries representative of a cross-section of the community, in view of the fact that the lists exclude over 30 million people, a disproportionate number whom are members of the lowest socio-economic strata of society.

Linquist, *An Analysis of Juror Selection Procedure in the United States District Courts,* 41 Temple L. Q. 32, 49 (1967).

Furthermore, it has been recognized that "One of the biggest factors in this underrepresentative quality of voting lists . . . includes residency requirements as well as extra-legal restrictions such as discrimination or intimidation." Note, *Jury Selection Procedures: A Reform,* 6 Suffolk Law Rev. 865, 882. (1969).

That voter lists frequently fail to reflect a fair cross-section of the community is particularly true as to Mexican Americans. In 1970, this Court noted Congress' findings that while the Voting Rights Act of 1965 had an appreciable impact upon the voter registrations of Blacks, voter registration of Spanish Americans had remained very low. *Oregon v. Mitchell,* 400 U.S. 112, 132 (1970). Mr. Justice Black observed that: "Congress also had evidence to show that voter

registration in areas with large Spanish American populations was consistently below the state and national averages." *Id.*, p. 132.

These congressional findings are further substantiated by the United States Census Report on voting and registration in the 1972 presidential election. The census statistics indicate that while 73.4% of all eligible Anglos registered to vote, only 44.4% of all eligible persons of Spanish origin registered to vote. (U.S. Bureau of Census, *Current Population Reports,* Series p. 20, No. 253, "Voting and Registration in the Election of November 1972," pp. 17-18, 22-23. These statistics reveal a serious situation with regard to the representation of Mexican Americans; in fact, the severity of the situation probably has been underestimated. The true dimensions of the disparity are not adequately measured because the 1970 Census was found to have undercounted Mexican Americans. Mexican American Population Commission of California, *Mexican American Population in California as of April 1973 With Projections to 1980: A Biannual Census Report,* p. 4-6 (1973); U.S. Commission on Civil Rights Report, *Counting The Forgotten: The 1970 Census of Persons of Spanish-speaking Background in the United States,* pp. iii-iv (1974). See *Confederacion de la Raza v. Brown,* 345 F. Supp. 909 (N.D. Cal. 1972).

These data take on special meaning in light of the provisions of the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, which specifies that the names of prospective jurors shall be selected

from voter registration lists or the list of actual voters and "*some other source or sources of names in addition to voter lists where necessary to insure the random selection from a fair cross-section of the community.*" 28 U.S.C § 1863 (3) (emphasis added). Indeed, the Civil Rights Commission recommended that supplementation be required:

> . . . . whenever the proportion of Negroes on the last selected jury list is lower by 10% or more than the proportion of voting Negroes in the district from which the names for the master jury wheel are chosen.

Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 Mercer Law Review 349, 374 (1969).

Notably, supplementation of voter lists is mandatory in the Uniform Jury Selection and Service Act which was approved in August 1970 by the National Conference of Commissioners on Uniform State Laws. A number of states, including Colorado, have adopted the Uniform Act. In approving the Act, the Commissioners noted that:

> The Uniform Act, as does the Federal Act, uses voting lists as the starting point; but voting lists are obviously incomplete, and the Uniform Act requires that they be supplemented from other sources to be designated by some rulemaking authority such as the State Supreme Court.

McKusick and Boxer, *Uniform Jury Selection and Service Act*, 8 Harv. J. on Legis. 220.